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Supreme Court of the United States

October Term, 1970

No. 650

NOY HAYNES,

Petitioner,

v.

JAMES H. CARR, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court is reported in 307 F. Supp. 1228. The opinion of the Court of Appeals is reported in 427 F.2d 700. These opinions appear as Appendices B and C to the petition for a writ of certiorari filed by Noy Haynes (pp. 20-39).

QUESTION PRESENTED

When a workman employed on a construction project by the general contractor is injured due to the alleged negligence or breach of warranty by a subcontractor engaged in the work, trade and occupation of the general contractor and the workman receives compensation under insurance coverage provided by his actual employer under a workmen's compensation act, is the application of the act so as to grant immunity to the subcontractor and all other persons engaged in the work, trade and occupation of the general contractor from common law tort actions for the workman's injury such an unreasonable and capricious classification as to deprive the workman of property without due process of law in violation of either the Fifth or Fourteenth Amendments of the United States Constitution?

STATEMENT OF THE CASE

References to the Petitioner for a writ of certiorari and its appendix will be made by the letters "P." and "App." followed by the page number:

The petitioner was a carpenter in the employ of Earl M. Childrey, Inc. which was employed as a general contractor for the purpose of constructing a building for the Jahnke Road Baptist Church. The plans and specifications for the building called for the use of a number of wood trusses, the subcontract for the fabrication of which was let by Childrey to the Respondent, James H. Carr, Inc. These trusses were prepared by Carr according to the plans and specifications prepared by the architect and structural engineer. These trusses were cut and holes were drilled at Carr's fabrication plant. They were subsequently shipped to the job site and were assembled there by Carr's employees. On October 25, 1965, a number of trusses collapsed allegedly because of

negligence or breach of warranty on the part of the Respondent. As the result, the Petitioner alleges that he suffered certain injuries for which, according to stipulation (p. 11, *infra*), he received the benefits provided in accordance with the provisions of the Workmen's Compensation Act of the Commonwealth of Virginia. The adequacy of such compensation has not been questioned by the Petitioner either in the United States District Court or in the Circuit Court of Appeals for the Fourth Circuit.

The Honorable United States District Court found it to be a fact that the Respondent was a contractor engaged in the "trade, business and occupation" of the general contractor, Childrey, as the Respondent was "doing work Childrey could have done with its own employees and with its own equipment and men had it determined that to be a better way" (App. p. 31). Carr and its employees were statutory employees of Childrey and statutory fellow servants of the Petitioner. Having reached this factual determination, the Court held that the Petitioner's exclusive remedy was workmen's compensation [Code of Virginia (1950) §§ 65.1-41 and 65.1-103 (1968 Repl. Vol.) App. pp. 17, 18] and being entitled to, and having received the same, he could not institute a third-party action against the Respondent seeking a recovery for his personal injury. See *Floyd, Adm'x* v. *Mitchell*, 203 Va. 269, 274; 123 S.E.2d 369, 372 (1962) where the Virginia Supreme Court of Appeals said:

> The test is not whether the owner (contractor) by engaging an independent contractor to perform some part of his business, thereby engages in the business of the independent contractor. It is whether the independent contractor is performing work that is part of the trade, business or occupation of the owner.

Also, in *Anderson* v. *Thorington Const. Co., Inc.*, 201 Va. 66; S.E.2d 514 (1959), app. dis. 363 U.S. 719 (1960) Anderson who was an engineer in the employ of Parsons, Brinkerhoff, Hall and McDonald, consulting engineers for the Richmond-Petersburg Turnpike Authority, was held to have no right to maintain a third-party action against Thorington which was doing a portion of the construction work for the Authority on the grounds that both Thorington and Anderson's employer were engaged in the work of the Authority in the construction of the turnpike and as such were fellow employees within the purview of Code of Virginia (1950) § 65-38, as amended, now § 65.1-41 (App. p. 17). As the Petitioner has pointed out, this case was before this court but it was dismissed "for want of a properly presented substantial federal question" (P. p. 12).

While the whole thrust of the Petitioner's argument both in the District Court and in the Court of Appeals has been elsewhere, he has contended that to deny him the right to maintain a third-party action against the Respondent was a denial of due process of law. Both Courts, however, have summarily rejected his position and have upheld the constitutionality of the Virginia Workmen's Compensation Act and its denial to the Petitioner and all other persons engaged in the trade, business and occupation of his employer the right of third-party actions against those similarly engaged.

ARGUMENT

Each state, by virtue of its inherent police power, has authority under the Constitution to alter the traditional common law rules for the purpose of implementing its legislative policy in the field of workmen's compensation. In *New York Cent. R. Co.* v. *White*, 243 U.S. 188 (1917), this court upheld the constitutionality of the New York Workmen's Compensation Act where the railroad contended that

its application deprived it of its property without due process of law. This court pointed out at 198 that "[n]o person has a vested right in any rule of law entitling him to insist that it shall remain unchanged for his benefit." The common law doctrine of negligence with its defenses of contributory negligence, assumption of risk and fellow servant negligence were said to be "inapplicable to modern employment." See 243 U.S. at 197. In all cases a statute should be construed so as to support rather than to defeat its constitutionality. See *Crowell* v. *Benson*, 285 U.S. 22 (1932).

The General Assembly of Virginia in its wisdom has enacted laws of workmen's compensation designed to see that the loss occasioned by the injury or the death of the employee is borne by the industry in which he is employed rather than by the individual wrongdoer. See *Doane* v. *E. I. duPont deNemours & Co.*, 209 F.2d 921 (4th Cir., 1951) and *Feitig* v. *Chalkley*, 185 Va. 96; 38 S.E.2d 73 (1946). The factual determination in this case establishes irrevocably that the Respondent was engaged in the "trade, business and occupation" of the general contractor and as such was a fellow employee of the Petitioner. It is the contention of the Petitioner that loss for his injuries should fall upon the Respondent who is alleged to be the wrongdoer. If such is the case, then where injuries to an employee may result from negligence on the part of a fellow employee both of whom are in the employ of a general contractor, then such loss should fall upon the fellow employee.

The Petitioner suggests that because there is no *quid pro quo* between the Petitioner and the Respondent he is being denied his property without due process of law by not being allowed to institute a third-party action against the Respondent. By the same token, an employee may be injured by the negligence of a fellow employee directly employed by the same employer and certainly no *quid pro quo* exists

between the two fellow employees. In quoting from Professor Larson (P. p. 13), the Petitioner suggests that the reason for allowing "third-party actions is the moral idea that the ultimate loss from wrongdoing should fall upon the wrongdoer." While this idea seems to be losing popularity generally, if it is true and demanded by the Fifth or Fourteenth Amendments of the Constitution, then all workmen's compesation laws should be declared unconstitutional and we should return to the common law where the loss falls upon the wrongdoer *even* if the wrongdoer is the injured party.

Counsel for the Petitioner suggests that immunity should not be allowed in this case particularly because the Court has drawn such a subtle distinction between a mere supplier of materials and a subcontractor. In all cases there must be a factual determination and in the present case, the factual question has been resolved in favor of the Respondent. Whether Respondent was a fellow employee of Petitioner is no longer an issue before this Court. It is suggested that granting immunity from suit to the Respondent may be a windfall to the negligent party if in fact the Respondent was negligent. On the other hand, when the employee is the negligent party and receives compensation, then there must be considered a windfall in his favor. That was the railroad's complaint in *New York Cent. R. Co.* v. *White*, *supra*, and this Court held that workmen's compensation was a reasonable exercise of the police power and not violative of the requirements of due process. It was the railroad's contention that the employee's own drunkenness caused his death and to require it to pay compensation simply because he was on the job at the time was a denial of its property without due process of law. This Court, however, stated that in order for such an act to be considered in contravention of the requirements of due process, the application of it must be "arbitrary and unreasonable." 243 U.S. at 205.

Petitioner relies in great measure on *Grasse* v. *Dealers Transport Co.*, 106 N.E.2d 179, 412 Ill. 179 (1952). In that case a truck driver and his employer's efforts to sue the employer of an adverse driver were thwarted by a provision of the Illinois Workmen's Compensation Act which provided that where an employee had received compensation and the third party tort-feasor was bound by the Act, only the employer had the right to sue the tort-feasor and only to the extent of the payment of compensation to its employee. Such a statute had the effect of limiting the employee's recovery to compensation in an accident where the third party was covered by the Act even where the third party had no relationship of any kind to the work, trade and business of the employer. The inconsistency arose because it allowed full recovery against one who had no relationship to the employee's business but happened not to be covered under the Act. This resulted in a classification which was, according to the Court, a denial of equal protection in that an employee involved in an automobile accident who received compensation would be barred from instituting an action for his injuries against a person employed in a business covered by the Act but would not be barred from instituting an action against a housewife driving the family automobile, even though she may have had no more relation to his employee's business than the driver of the adverse vehicle in the *Grasse* case. Admittedly, the Illinois Court does state that the application of the Act in the case is also violative of due process but points out that the constituional guarantees of due process and equal protection overlap one another and equal protection extends beyond the requirements of due process of law. See also *Truax* v. *Corrigan*, 257 U.S. 312 (1921).

The Court here is not faced with an arbitrary classification and although *Northern Pac. Ry.* v. *Meese*, 239 U.S.

614 (1916) held that the workmen's compensation act there in question was not in conflict with the requirements of the equal protection clause, the reasoning contained therein is just as applicable to the question as to whether it is also violative of the due process.

The application of this act is consistent in that it allows employees to institute suits against third persons who are strangers to the trade, business and occupation of the employer but grants immunity from suit to those conducting his business [Code of Virginia (1950) §§ 65.1-41 and 65.1-103 (1968 Repl. Vol.)]. All persons, including the employees of the Respondent who were engaged in the trade, business and occupation of the general contractor, Childrey, were entitled to claim compensation from Childrey if compensation was not otherwise provided by their immediate employers. The fact that the Petitioner as an employee of Childrey could not collect workmen's compensation from Carr is of no moment. Workmen's compensation statutes were established in order that the injured workman, regardless of who was at fault, would not have to bear the burden of the injury sustained in an industrial accident for in most cases his limited income would not be sufficient to sustain him during his period of recuperation and he and those dependent upon him might be overcome by poverty and would become a burden upon public or private charity. See *New York Cent. Ry. Co.* v. *White*, *supra* at 197. Workmen's compensation laws were designed to protect the worker and his dependents and even in a case where a brother and sister of a longshoreman were denied compensation under the Longshoremen's Act because they were not his dependents, a denial of their right to institute a wrongful death action under which they were potential beneficiaries, did not amount to a denial of their property without due process of law. The compensation laws provided the necessary protec-

tion to the deceased employee and abrogation of what would be his siblings' rights under a wrongful death act was not unreasonable or capricious and was within the police power of the state. See *Rhinehart* v. *Smith & Son,* 14 So.2d 287 (La.App., 1943).

The statutory framework constituting the Virginia Workmen's Compensation Act, which seeks to see that losses occasioned as a result of an individual injury are borne by the industry itself rather than by the wrongdoer, meets the constitutional requirements of due process for it is not an unreasonable and arbitrary classification. Those engaged in the trade, business and occupation of a general contractor, are entitled to compensation under the Act and are immune from suit by their fellow employees whether the employees are direct employees of the general contractor or statutory employees under the interpretation of the Act by the Virginia Court. Those parties who are not engaged in the trade, business and occupation of the employer are amenable to suit by the injured employee. See *Garrett* v. *Tubular Products, Inc.,* 176 F.Supp. 101 (E.D. Va., 1959). The Respondent has been held to be engaged in the trade, business or occupation of the general contractor, Earl M. Childrey, Inc., and if the Petitioner is permitted to institute a third-party action against the Respondent, then any employee should be allowed to institute a third-party action against any other fellow employee responsible for his injury even one directly employed by his immediate employer. If such is allowed, the entire reasoning behind the enactment of workmen's compensation laws—that is that the loss for industrial injury to an employee should fall upon the industry which employs him—fails. In most instances, the employer acts only through its agents and if workmen's compensation can provide immunity only for the employer itself then the whole purpose of the Act is thwarted and the loss will fall not upon the industry but upon the individual employee causing the in-

jury, whether that employee be a direct fellow servant of the injured employee or a subcontractor engaged in the trade, business and occupation of the general contractor.

CONCLUSION

It is clear that the Virginia Workmen's Compensation Act establishes no unreasonable or arbitrary standard in denying those who are entitled to compensation the right to bring third-party actions against those engaged in the trade, business and occupation of their employers. An employee injured has no vested right of action against the third party and the granting of immunity to those engaged in the trade, business and occupation of his employer does not amount to a denial of the employee's property without the due process of law.

Certiorari should therefore be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Three copies of this brief in opposition were mailed postage prepaid, to George E. Allen, Esquire, and James A. Eichner, Esquire, 1809 Staples Mill Road, Richmond, Virginia 23230, counsel for petitioner, on or before October 2, 1970.

RICHARD L. WILLIAMS

APPENDIX

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA,

RICHMOND DIVISION

STIPULATION

It is hereby stipulated and agreed to by all parties hereto, by counsel, that at the time of his injury on October 25, 1965, the complainant, Noy Haynes, was an employee of Earl M. Childrey, Inc., and as such has received and continues to receive benefits under the Virginia Workmen's Compensation Act.